89-1810

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILLIAM R. SAUL, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
STATE CIVIL SERVICE COMMISSION
and
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR AND INDUSTRY,
Respondents.

ON WRIT OF CERTIORARI TO
THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Proceeding Pro Se:

William R. Saul
101 Sauls Drive
Greensburg, PA 15601
412-834-5667

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TO THE COMMONWEALTH COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William R. Saul, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Commonwealth Court of Pennsylvania entered in the above captioned case on August 23, 1989.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Pennsylvaina procedural doctrine of failure to exhaust an administrative remedy is an adequate ground for dismissing Saul's mandamus cause against the Commonwealth of Pennsylvania for appointment to a civil service employment position thereof and premised upon the unconstitutional taking, without due process of law, of Saul's property/liberty interest in his veterans' preference status by the Pennsylvania State Civil Service Commission.

II. Whether Saul has waived (or not properly asserted) his Constitutional claim ?

III. Whether Saul's mandamus causes against the Commonwealth of Pennsylvania for appointment to civil service employment positions thereof, not premised in any way upon the removal of his

veterans' preference status by the Pennsylvania State Civil Service Commission, were properly dismissed by the Commonwealth Court of Pennsylvania for failure to exhaust an administrative remedy ?

IV. Whether Saul was required by law to be appointed to the civil service position sought in Count II of his action ?

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REFERENCE TO OPINIONS BELOW

The hearing court herein was the Commonwealth Court of Pennsylvania. Its opinion, unreported, appears herein as Appendix A, page 1a. The Decree Nisi of said court appears herein as Appendix B, page 33a. The Commonwealth Court's opinion, unreported, on Petitioner's Exceptions to the Decree Nisi appears herein as Appendix C, page 35a and its Order concerning said Exceptions appears herein as Appendix D, page 41a. The Pennsylvania Supreme Court did not review this case. The said supreme court's order denying review appears herein as Appendix E, page 42a.

JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania was entered on August 23, 1989. The Pennsylvania Supreme Court declined review of this judgment by Order

dated and entered on March 9, 1990. The jurisdiction of this Court is invoked under 28 USC Section 1257(a).

CONSTITUTIONAL PROVISION INVLOVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. Said section reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

1 Pa.C.S.A. section 1504: "In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect."

2 Pa.C.S.A. section 504: "Hearing and record. No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings.

42 Pa.C.S.A. section 708(e): "(e) Single form of action.-Where pursuant to general rules review of a determination of a government unit may be had by a petition for review or another single form of action embracing the appeal and actions in the nature of equity, mandamus, prohibition, quo warranto or otherwise, the jurisdiction of the appellate court shall not be limited by the provisions of 1 PA.C.S. section 1504 (relating to statutory remedy preferred over common law), but such provisions to the extent applicable shall limit the relief available."

42 Pa.C.S.A. section 5103(a): See Appendix K, page 57a.

51 Pa.C.S.A. section 7104(b): "(b) Name on civil service list.-Whenever any soldier possesses the requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as the result of any such civil service

examination, the appointing or promoting power in making an appointment or promotion to a public position shall give preference to such soldier, notwithstanding, that his name does not stand highest on the eligible or promotional list."

71 P.S. section 741.203(3): "It shall be the duty of members of the commission as a body - (3) To make investigations on its own motion and, in its discretion, on petition of a citizen concerning any matter touching the enforcement and effect of the provisions of this act and to require observance of the provisions of this act and the rules and regulations thereunder."

71 P.S. section 741.601: "Certification. Whenever a vacancy is likely to occur or is to be filled in a permanent position in

the classified service, the appointing authority shall submit to the director a statement indicating the position to be filled. Unless the appointing authority elects to follow one of the alternative provisions of section five hundred one, or unless there is in existence a labor agreement covering promotions in permanent positions in the classified service, in which case the terms and procedures of such labor agreement relative to the procedures for promotions shall be controlling, the director shall thereupon certify to the appointing authority the names of the three eligibles willing to accept appointment who are highest on the appropriate promotion list or employment list, whichever is in existence, or from the one, which under the rules of the commission, has priority. If the appropriate list contains less than three eligibles who are willing to accept

appointment, the names certified may be taken from the other appropriate list to make a certification of at least three eligibles. If there are less than three eligibles on appropriate eligible lists who are willing to accept appointment, the director shall certify all the names on these lists. If there is no apporpriate eligible list, the director may certify from such other list or lists as he deems the next most nearly appropriate. If upon inquiry by the director any person on any promotion or employment list is found to be not available for promotion or appointment, his name shall not for the time being be considered among the names from which a promotion or appointment is to be made."

PROCEDURAL RULES INVOLVED

Pa.R.C.P.No. 1019(a): "CONTENTS OF PLEADINGS. GENERAL AND SPECIFIC AVERMENTS. (a) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form."

INTERNAL OPERATING PROCEDURES FOR THE COMMONWEALTH COURT, Section 331: "Where a party files a petition for reconsideration of an order issued by a single judge, the prothonotary shall submit the petition, together with any answer, to the judge for action, in accordance with Pa.R.A.P. 123(e)."

STATEMENT OF THE CASE

This is an action initially commenced by Petitioner, William R. Saul, in the Court of Common Pleas of Dauphin County, Pennsylvania but which was immediately transferred to the Commonwealth Court of Pennsylvania as being within that court's original, exclusive jurisdiction. Saul's cause in the nature of mandamus was against the respondent, the Commonwealth of Pennsylvania acting through both the State Civil Service Commission (hereinafter, Commission) and the Department of Labor and Industry (hereinafter, L&I). Saul's three count complaint alternatively sought his appointment by L&I to three civil service employment positions with the respondent. Two of the employment positions sought by Saul concerned events when Saul "had" veterans' preference and one position

sought by Saul concerned events when Saul's veterans' preference had been taken from him by the Commission. Pursuant to order of court dated May 19, 1988, trial was held in July, 1988 on the limited factual issues as to liability on Count II of Saul's cause (the position sought by Saul when his veterans' preference had been taken from him by the Commission and hereinafter referred to as the position in question) and the Commonwealth's defense of laches. Said order is appended hereto as Appendix F, page 43a.

On December 15, 1988, the Commonwealth Court entered the Memorandum Opinion (consisiting of a Statement of Facts, Discussion and Conclusion of Law) appended hereto as Appendix A, page 1a and its Decree Nisi appended hereto as Appendix B, page 33a. Said Decree Nisi dismissed all counts of Saul's cause.

The Commonwealth Court found that, pursuant to the "Rule of Three", the three highest scoring available persons interviewed for the position in question (one of which was Saul in December, 1981) did not have veterans' preference and that one other than Saul was appointed to the position in question (Appendix A, Fact # 22, page 9a). The Commonwealth Court found at Fact Number 42 (Appendix A, page 15a) that Saul "knew" of his veterans' preference revocation in January, 1983, and that he should have known of its removal in December, 1981. The Commonwealth Court also, somewhat inconsistently, found at Fact Number 17 (Appendix A, page 8a) that the Commission sent notice of the removal of his veterans' preference to Saul "when" the same had been accomplished.

In his Proposed Findings of Fact, Saul proposed that his veterans' preference

revocation was accomplished by the Commission without any notice whatsoever to Saul. In his Exceptions to the Decree Nisi, Saul challenged the Commonwealth Court's Fact Number 17 that he was notified "when" the Commission had removed his veterans' preference.

Simultaneously with the filing of his Exceptions to the Decre Nisi on or about January 2, 1989, Saul filed a Supplemental Proposed Finding of Fact and Supplemental Proposed Conclusions of Law wherein he proposed that his veterans' preference had been removed by the Commission without any prior notice and without any prior opportunity to be heard and that the same therefore constituted the unconstitutional taking of Saul's liberty/property without due process of law. This Supplement was subsequently stricken from the record by the Commonwealth Court (Appendix F, page

43a). Thereafter, on or about February 7, 1989, Saul filed a Request for Reconsideration reraising said supplemental proposals which was stricken by the Commonwealth Court (Appendix G, page 44a).

On August 23, 1989, the Commonwealth Court of Pennsylvania entered its unreported opinion and order dismissing Saul's previously filed Exceptions and entering the December 15, 1988 Decree as a final decree. (Appendix C, page 35a and Appendix D, page 41a.)

Thereafter, Saul filed a Notice of Appeal to the Pennsylvania Supreme Court and Jurisdictional Statement which also raised the revocation of his veterans' preference without any prior notice or any prior opportunity to be heard. Said filings were considered by the supreme court as a Petition for Allowance of Appeal and were

denied by the supreme court without opinion by order entered March 9, 1990 (Appendix E, page 42a).

REASONS FOR GRANTING WRIT

I. THE PENNSYLVANIA PROCEDURAL DOCTRINE OF FAILURE TO EXHAUST AN ADMINISTRATIVE REMEDY IS NOT AN ADEQUATE GROUND FOR DISMISSING SAUL'S CAUSE CONCERNING THE POSITION IN QUESTION AND PREMISED UPON THE UNCONSTITUTIONAL TAKING OF SAUL'S LIBERTY/PROPERTY.

Concerning the position in question, it is respectfully submitted that Saul's veterans' preference status constituted a liberty/property interest of his. See: Stana v. School Dist. of the City of Pittsburgh, 775 F.2d 122 (3rd Cir. 1985). As such, it is clear that the State cannot revoke the same without an inquiry that comports with procedural due process.

While great contest was had in the trial hereof concerning when Saul knew of the removal of his veterans' preference status by the State Civil Service Commission, it is respectfully submitted that the record herein conclusively establishes that the removal occurred without any prior notice to Saul and without any prior opportunity for him to be heard. Specifically, the testimony of Edgar L. Yost, Acting Executive Director of the State Civil Service Commission (Appendix J, page 56a), indicated that "when" Saul's veterans' preference was removed, that is, after it was removed, notice would have been sent to Saul. Saul respectfully submits that this clearly implicates the requirements of procedural due process. Additionally, the record contains absolutely no evidence suggesting why pre-revocation notice and a hearing was not possible or desirable in this case.

The trial court dismissed Saul's cause concerning the position in question because it found that Saul had failed to exhaust his administrative remedy of seeking review by the Commission of its decision revoking his veterans' preference. The court found that 71 P.S. section 741.203(3) provided Saul with an administrative remedy. It is respectfully submitted that this was error.

71 P.S. section 741.203(3) concerns only "discretionary investigations," provides no jurisdiction or authority for the Commission to award the relief herein sought by Saul (replacing the current occupant of the position in question and back pay), and provides no right of review to Saul with the Commission. As such, said section does not provide Saul with an adequate administrative remedy. See: Ohio Casualty Group v. Argonaut Insurance

Co., 514 Pa. 430, 525 A.2d 1195 (1987); Magnelli v. Comm., Civil Service Commission, 34 Pa.Cmwlth. 335, 383 A.2d 561 (1978). Further, the Pennsylvania doctrine of exhaustion of administrative remedies is founded upon 1 Pa.C.S. section 1504. See: Ohio Casualty Group, supra. In that 42 Pa.C.S. section 708(e) dictates that the jurisdiction of an appellate court shall not be limited by 1 Pa.C.S. section 1504 in actions in the mature of mandamus, Saul's mandamus cause herein can not be defeated by the doctrine of exhaustion of administrative remedies.

Additionally, the Pennsylvania Supreme Court has held that a Commonwealth agency adjudication made without prior notice and an opportunity to be heard is invalid and is properly challengeable in the original jurisdiction of the Commonwealth Court of Pennsylvania. See: Callahan v. Penna.

State Police, 494 Pa. 461, 431 A. 2d 946 (1981); 2 Pa.C.S.A. section 504. The doctrine of exhaustion of administrative remedies is not an adequate ground to dispose of Saul's constitutional claim herein on this independent ground alone.

Even further, to require Saul to have proceeded before the Commission with his cause herein would violate Saul's procedural and substantive due process rights guaranteed him under the 14th Amendment to the Constitution of the United States of America as the Commission is not an impartial tribunal in a position to fairly assess its own liability. See: Ohio Casualty Group, supra. At the least, due process requires a fair trial and a fair trial requires that no person be judge in a controversy wherein he has an interest in the outcome. See: Re: Murchinson, 349 U.S. 133 (1955).

It is anticipated that the Commonwealth may claim that the judgment in question was also based upon the defense of laches and the statute of limitations. This would be erroneous. The sole conclusion of law of the Commonwealth Court of Pennsylvania was the exhaustion of administrative remedy doctrine (Appendix A, page 32a). Also, the removal of Saul's veterans' preference status without due process of law constitutes, pursuant to Pennsylvania law, an "invalid adjudacation." See: Callahan, supra.; Brooks v. Comm., Dept. of Agriculture, 105 Pa.Cmwlth. 196, 523 A.2d 845 (1987); Case v. Comm., Dept. of Agriculture, 112 Pa.Cmwlth. 256, 535 A.2d 284 (1987). As an invalid adjudication, neither laches nor any statute of limitations ever began to run against Saul herein.

Finally, as noted in Henry v. Mississippi,

379 U.S. 443 (1965), the question of when state procedural rules can preclude the Supreme Court's review of a federal question is itself a federal question upon which a person is entitled to invoke the Supreme Court's judgment.

II. SAUL HAS NOT WAIVED HIS DUE PROCESS VIOLATION CLAIM.

It is anticipated that the Commonwealth of Pennsylvania will assert that somehow Saul has waived (or not properly asserted) his Constitutional claim. This would be an erroneous assertion.

Pennsylvania is a fact pleading state, not a "legal theory" pleading state. Pa.R.C.P.No. 1019(a) dictates that: "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." See: Stoker

et al. v. Reading Railway Co., 254 Pa. 494, 99 A. 28 (1916); Weiss v. Equibank, 313 Pa.Super. 446, 460 A.2d 271 (1983); Accord, Missouri, Kansas & Texas Railway Co. v. Wulf, 226 U.S. 570 (1913). In Pennsylvania, laws need not be plead - only facts.

Saul's assertion at paragraph 9 of his Amended Complaint that his veterans' preference status was revoked "without any notice whatsoever" adequately alleges the fact that forms the basis of his Constitutional claim, that is, that his liberty/property was taken without any prior notice and, as a necessary consequence of the foregoing and necessarily subsumed therein, without any prior opportunity to be heard. The foregoing allegation thus factually alleged a due process violation. Additionally, the Commonwealth's Answer to said paragraph 9, by limiting itself to an

alledged "notice" sometime between August 28, 1981, and January 1983, admits the lack of any prior notice. Saul's specification in his Supplemental Proposed Finding of Fact and Request for Reconsideration (which Request for Reconsideration is specifically permitted by section 331 of the Internal Operation Procedures for the Commonwealth Court) therefore alleged nothing new but merely particularly poignatized that whcih had always been claimed by Saul. Saul has therefore not waived or failed to assert his due process claim and Saul has not attempted to raise a new cause of action by asserting the same. See: Black's Law Dictionary, Special Deluxe Fifth Edition, Cause of Action: "The fact or facts that give a person the right to judicial relief.. . . "

III. SAUL'S CAUSES CONCERNING EMPLOYMENT POSITIONS WHEN HE HAD VETERANS' PREFERENCE WERE IMPROPERLY DISMISSED.

Pursuant to Order of Court herein dated May 19, 1988 (Appendix F, page 43a), only the issues of liability on Count II of Saul's Amended Complaint (the position in question) and the Commonwealth's defense of laches were before the court for consideration. The trial court's dismissal of Counts I and III of Saul's Amended Complaint and of his Complaint was therefore error.

While Saul went to trial herein believing that only issues as to liability on Count II of his Amended Complaint were under consideration based upon said May 19, 1988 Order, he concedes that said Order is ambiguous concerning its "Commonwealth's defense of laches" language. Specifically, was the Commonwealth's defense of laches as applicable to Count II only to be considered or was said defense as applicable to all Counts of Saul's Amended

Complaint to be considered also ? Irregardless, because the trial court's Decree Nisi herein was premised upon the sole Conclusion of Law that Saul failed to exhaust his administrative remedy regarding the revocation of his veterans' preference, because the "liability facts" of Counts I and III of Saul's Amended Complaint were not before the court, because said Counts I and III concern facts and causes when Saul had veterans' preference, and because laches is a factual defense, it is respectfully submitted that the trial court erred in dismissing Counts I and III of his Amended Complaint and his Complaint.

Because the trial court found that Saul had failed to exhaust his administrative remedies, it dismissed his entire cause. Even if the foregoing contentions of Saul are found to be nonmeritorious, it is

respectfully submitted that it was error to dismiss Saul's cause. It should have been transferred. See: 42 Pa.C.S. section 708 and 5103(a); St. Clair v. Comm., Penna. Bd. of Probation and Parole, 89 Pa.Cmwlth. 561, 493 A.2d 146 (1985).

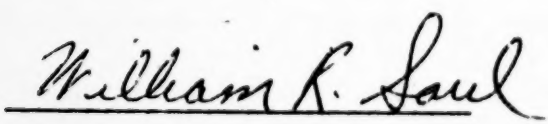
IV. SAUL WAS REQUIRED BY LAW TO BE APPOINTED TO THE POSITION IN QUESTION.

As the only veteran among the three highest scoring candidates available for appointment to the position in question, and given that the Commonwealth filled the position, the law mandated that Saul be appointed to the position in question. See: 51 Pa.C.S. section 7104(b); 71 P.S. section 741.601; 'Rasmussen v. Borough of Aspinwall, 103 Pa.Cmwlth, 109. 519 A.2d 1074 (1987); Comm., ex rel. Graham v. Schmid, 333 Pa. 568, 3 A.2d 701 (1938).

CONCLUSION

On the basis of the foregoing, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Commonwealth Court of Pennsylvania in question.

Respecfully submitted:



William R. Saul
Proceeding Pro Se

Appendix A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM R. SAUL, Petitioner	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and THE COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION, Respondents	:

BEFORE: HONORABLE PAUL S. LEHMAN, Senior Judge

HEARD: July 25, 1988

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE LEHMAN
FILED December 15, 1988

On July 12, 1985 the petitioner, William Saul (petitioner), filed a petition for review in the nature of a complaint in mandamus and, later, an amended petition alleging that respondent, State Civil Service Commission (Commission), wrongfully refused to add a ten-point "veterans' preference" to the results of a civil service test he took in 1980. Petitioner alleges that as a result, respondent, Department of Labor and Industry (L&I), wrongfully failed to offer him employment as a Workmen's Compensation Appeals Referee and Appeals Referee Trainee. Petitioner seeks relief in the form of an order directing his immediate hire to one of these positions, as well as back wages and benefits.

Respondents filed an answer with new matter and, later, an amended answer with new matter,denying that petitioner is

entitled to veterans preference and raising the affirmative defenses of sovereign immunity, the statute of limitations and laches. Petitioner filed replies and amended replies, and included with his last reply, entitled "amended reply to new matter and new matter," certain allegations related to the Commonwealth's insurance coverage. However, Pa.R.C.P. No. 1017 (a) limits pleadings to a complaint and answer, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and an answer thereto. Respondents' pleadings contain no counterclaim. The Pennsylvania Rules of Civil Procedure do not provide for new matter to be included in a reply when there is no counterclaim. Consequently, petitioner's motion to permit the new matter contained in the amended reply is denied.

After most of the pleadings were submitted and a significant amount of discovery was completed the Court entertained respondents' motion for summary judgment. Respondents argued that the statute of limitations and laches barred the instant action. In an unpublished opinion, Senior Judge Jacob Kalish denied the motion, noting that petitioner's pleadings raised allegations regarding material facts which, if true, prevent respondents from raising these defenses.

The matter went to trial on July 25, 1988. Petitioner agreed to limit evidence to the facts surrounding petitioner's pursuit of employment as an Appeals Referee Trainee for Dauphin County. Respondents agreed to limit evidence to the affirmative defense of laches while preserving the right to pursue other legal arguments. After trial, with leave of court, the parties submitted posttrial

briefs and proposed findings of fact and conclusions of law. The matter is now ready for adjudication pursuant to Pa.R.C.P. No. 1517(a).

STATEMENT OF ISSUES

The material issue in this matter is: Whether the petitioner is entitled to the extraordinary remedy of mandamus.

STATEMENT OF FACTS

1. Petitioner received a high school degree in June 1969, a bachelor of arts degree from Allegheny College in Meadville, Pennsylvania in 1973, and a Juris Doctor degree from the University of Pittsburgh in 1976.

2. Petitioner was an attorney for Legal Services for five and one-third years beginning in 1976 and now is in private practice.

3. Petitioner is proceeding pro se in this matter.

4. Petitioner was a cadet in the United States Air Force Academy in Colorado from June 23, 1969 until November 6, 1969, when he was honorably discharged.

5. Petitioner's form DD-214 reflects that he was a United States Air Force cadet.

6. Veterans' preference status results in civil service applicants receiving a ten-point increase in their final scores and receiving preference in the employment process.

7. It is the Commission that grants or denies veterans' preference to civil service applicants and then advises L&I of its decision.

8. L&I does not grant or deny veterans' preference to any individual.

9. In 1980 and 1981, petitioner took examinations offered by the Commission for the positions of Workmen's Compensation Referee and Appeals Referee Trainee, which are civil service positions.

10. From the beginning of 1980 and 1981

when petitioner sought to become eligible for civil service positions, he sought to obtain veterans' preference and wrote the Commission on this matter.

11. The Commission initially gave petitioner veterans' preference.

12. As a result of initially having veterans' preference, petitioner had a final earned rating score of 103.35 on the Commission's employment list for the position of Appeals Referee Trainee, of which ten points reflected veterans' preference points.

13. On February 26, 1981, the Commission sent petitioner a "Notice of Examination Results", which petitioner received shortly thereafter, reflecting that petitioner's test results or Final Earned Rating for the Appeals Referee Trainee (Trainee) position was 103.35.

14. The "Notes of Examination Results" in large bold print directed petitioner to "SEE BACK FOR EXPLANATION."

15. The reverse side of the February 26, 1981 notice informed Petitioner that his test scores and veterans' preference were his Final Earned Rating (FER), and that the grant of veterans' preference added 10 points to his test score.

16. Subsequently, the Commission believed it erred in granting petitioner veterans' preference. On August 28, 1981, it revoked its recognition of petitioner as a veteran entitled to preference, removed 10 points from petitioner's rating and thus reduced his Trainee FER score to 93.35.

17. When the correction to petitioner's Final Earned Rating was made by removing veterans' preference, the Commission sent petitioner notice of this action.

18. Although petitioner claims he did not discover the removal of his veterans' preference until January 17, 1984, the testimony and exhibits establish that petitioner knew, or should have known, of the veterans' preference removal on or before December 1981.

19. On December 7, 1981, L&I sent petitioner an "Interview Notice/Availability Survey" for a Trainee position in Harrisburg; the Notice clearly indicated petitioner's Final Earned Rating was only 93.35.

20. Petitioner signed and returned this Notice form on December 14, 1981.

21. On December 14, 1981, petitioner interviewed for this Trainee position in Harrisburg, Dauphin County.

22. Following the "Rule of Three", L&I interviewed the top three highest scoring available candidates--Saul [petitioner], Kennedy and Gordon--all of whom did not have veterans' preference. Kennedy was selected and began employment on February 11, 1982.

23. On January 6, 1983, L&I sent petitioner an "Interview Notice/Availability Survey" for a Trainee position in Reading; the Notice clearly stated that petitioner's Final Earned Rating was 93.35.

24. Petitioner signed this Reading Trainee Notice on January 11, 1983.

25. On January 6, 1983, L&I also sent petitioner an "Interview Notice/Availability Survey" for a Trainee position in Philadelphia; the Notice clearly stated that petitioner's Final Earned Rating was 93.35.

26. Petitioner signed this Philadelphia Trainee Notice on January 6, 1983.

27. Thereafter, on January 22, 1983, petitioner interviewed with L&I personnel for various Trainee positions, which included the Reading position.

28. Two members of the January 22, 1983 L&I interview committee were Susan (Benner) Devine and Richard Cole. Susan Devine was then the Chief of Recruitment and Placement in the Bureau of Personnel of L&I, while Cole was then L&I's Chief Counsel.

29. Devine recalls interviewing petitioner due to the unusual situation she faced in

January 1983. Usually L&I interviewed only veterans since they would be given preference on most occasions. However, due to the large number of positions L&I was interviewing for at that time and due to the fact that veterans had made themselves available for multiple counties, it was possible that L&I could reach and hire nonveterans in some counties. Accordingly, nonveterans were also interviewed then to avoid having to have a second round of interviews at a later time.

30. Devine explained to all nonveterans, including petitioner, that she was interviewing them regardless of their lack of veterans' preference status to explain why their appointment may or may not be blocked by a veteran.

31. When Devine mentioned to petitioner during the interview process on January 22, 1983, that he did not have veterans' preference, petitioner admitted that he

used to have veterans' preference but that the Commission had removed it and he did not understand why.

32. Devine told petitioner she would call the Commission to question why petitioner's veterans' preference had been removed in case there had been an oversight.

33. Devine then did call the Commission regarding petitioner's veterans' preference and discovered that the status had been removed because according to the Commission it never should have been given to petitioner in the first place.

34. Devine then called petitioner in early February 1983, approximately two weeks after the January 22, 1983 interview, and told him that she had called the Commission, had inquired about his veterans' preference status, and had been informed that petitioner's veterans' preference initially was granted in error.

35. Petitioner never called or wrote

Devine after this early February 1983 telephone conversation, nor did petitioner send Devine any documents.

36. Devine also informed Richard Cole that she had telephoned the Commission to look into the matter of petitioner's veterans' preference, that the Commission had told her petitioner's veterans' preference had initially been granted in error, and that she had telephoned petitioner and informed him about what the Commission had said.

37. Although petitioner denies parts of Devine's version of his conversation with her, Devine's testimony is more credible that [sic] petitioner's as to the two conversations.

38. Even by petitioner's own admissions, Devine told petitioner that L&I's records did not reflect that petitioner had veterans' preference, and Devine further told petitioner that she would look into his veterans' preference status to see if there was a problem.

39. Even though petitioner knew, at the very least, that L&I's records did not reflect him possessing veterans' preference as of January 1983, petitioner did not write or telephone the Commission regarding this matter until January 17, 1984, when petitioner telephoned the Commission.

40. When petitioner did call the Commission on January 17, 1984, he was calling only to determine if any new certification lists had been issued since he was interviewing for a private law firm position and he thought his eligibility on the certification lists expired the end of the preceding year. Indeed, petitioner's eligibility and placement on the Commission's employment lists expired at the end of December 1983 for a Workmen's Compensation Referee position and at the end of February 1984 for a Trainee position.

41. On January 17, 1984, petitioner

telephoned the Commission and talked to Elizabeth Day, a Commission employee. Petitioner had no knowledge of Day's position or title and assumed she was a secretary who had just answered the telephone.

42. Petitioner testified that he first learned of the Commission's specific removal of his veterans' preference status on January 17, 1984, when talking to Day. However, the record shows that he knew of the veterans' preference removal on January 22, 1983, and should have known of its removal in December, 1981.

43. On January 18, 1984, petitioner again talked to Day and requested that she send him copies of documents in his file regarding veterans' preference.

44. Petitioner did not have a detailed conversation with Day because he assumed that Day could do nothing more than forward documents to him and that she could not resolve the situation.

45. Day had been a Commission employee for the last 16 1/2 years and receives an average of 75 telephone calls a day in her section.

46. Because petitioner's job applications, which would contain petitioner's documents, were filed in 1980 and 1981, Day had to request archives to pull petitioner's applications, which normally takes a few days.

47. Petitioner's application could not be located at the time so that Day was unable to forward petitioner's documents to him

48. The Commission did not wilfully refuse to send petitioner documents but, rather, could not locate his application.

49. Although a Commission document, a worksheet reflecting petitioner's veterans' preference removal, was in the Commission's file in 1984, Day did not send this document because it was a Commission document and Day thought petitioner only wanted his records, not the Commission's records.

50. When petitioner did not receive any documents, petitioner neither called nor wrote Day or any other Commission employee to ask where the documents were or to renew his document request.

51. Following his January 17 and 18, 1984 conversations with Day, petitioner neither wrote anyone at the Commission, nor initiated any formal or informal action with the Commission about his veterans' preference status until he filed the present law suit on July 11, 1985, one and one-half years later.

52. At the July 25, 1988 hearing, petitioner testified that no one ever told him or sent him anything to explain what a Final Earned Rating was. Therefore, petitioner claimed that the three different "Interview Notice/Availability Surveys" sent to him in December 1981 and January 1983, which reflected a 93.35 Final Earned Rating in each case, had no significance to him. Because the

Commission's Notice of Examination Results to petitioner referred to his initial score of 103.35, with its 10 veterans' preference points, as "test results", petitioner implied that he did not know that "test results" were his "Final Earned Rating". We find that petitioner's testimony on this point is not credible in that the reverse side of petitioner's Notice of Examination Results clearly states that "test results" are the applicant's "Final Earned Rating" for each job title with 10 points being granted to a veteran.

53. The reverse side of petitioner's Notice, under the section "Veterans' Preference Granted," also states that veterans' preference adds 10 points to the applicant's FER.

54. Petitioner testified at trial that in January 1984 petitioner researched the law and could not determine anywhere that being number one (the highest scoring

applicant) on a certification list guaranteed him the position. We find this testimony not credible, since, in a January 17, 1983 letter to Cole, petitioner wrote that he had just learned that date that being number one on an employment list as a veteran guaranteed him the position.

55. Moreover, when questioned at his deposition about why he delayed for one and one-half years in filing suit from the date he at least admits he knew his veterans' preference had been removed, petitioner stated that he was not sure he had a cause of action at that time, which testimony he repeated at trial. Nevertheless, in petitioner's initial verified complaint filed on July 11, 1985, petitioner averred, "In early January 1984, Plaintiff researched the law and then first determined that his qualifications mandated his appointment to all of the positions [including the

Kennedy position] herein before discussed. . . ." Additionally, petitioner clearly reflected in his January 17, 1983 letter to Cole that he believed L&I had wrongfully rejected him for employment and that Cole should limit "the state's liability."

56. In light of Devine's clear and precise testimony that petitioner conceded in January 1983 that he knew the Commission had removed his veterans' preference earlier, and in light of Devine's lack of motive to lie, petitioner's claim that he did not discover the removal of his veterans' preference until January 17, 1984, is not credible. Moreover, although petitioner claimed he sent Devine a copy of his May 1981 test results to prove his veterans' preference, petitioner failed to proffer any evidence to prove this claim.

57. While petitioner testified that he was not notified of his non-appointment following the December 14, 1981 interview

for the Dauphin County position, petitioner averred in his initial complaint that he had not been appointed to the Trainee positions he interviewed for on December 14, 1981, and January 22, 1983 and further alleged that he had not been "directly notified" of his non-appointment to the December 1981 Dauphin County position.

58. Although petitioner testified that throughout the hiring process--from his placement on the Commission's certification lists in 1981 through 1984--that he had various contacts with various persons connected with "the civil service situation", L&I, and attorneys and that it was his practice to determine what his rights were and what he could do, petitioner contacted very few persons regarding veterans' preference and his employment situation.

59. As noted above, petitioner claimed that no one ever notified him about his

non-appointment to the Dauphin County Trainee position or about Kennedy having been selected following the December 14, 1981 interview. Nevertheless, petitioner never telephoned or wrote anyone to discover the status of this Trainee position although petitioner clearly had taken such actions for other positions he had interviewed for as reflected in letters dated October 10, 1983 and December 20, 1983.

60. Even though petitioner believed he had a clear legal right to employment in January 1984, petitioner, an attorney, waited one and one-half years to file suit because: a) he did not believe he had a cause of action, and b) he had obtained another job in February 1984 and he did not have time to get into this matter.

61. To pursue this matter, petitioner contacted only one attorney, then ceased his search for counsel.

62. Although petitioner discussed his

veterans' preference status and its nonexistence in L&I records with Devine on January 22, 1983, the next person petitioner wrote was Cole in an October 10, 1983 letter, which letter did not address veterans' preference in any respect.

63. Petitioner's next letter to Cole, not Devine, was dated December 20, 1983, and also did not address veterans' preference in any manner. Petitioner did not contact anyone at the Commission, which grants or denies veterans' preference, until January 17, 1984, and that telephone call was not directed towards ascertaining petitioner's veterans' preference status.

64. When petitioner did talk to Day on January 18, 1984 about his veterans' preference, as reflected in petitioner's brief notes of this conversation, petitioner obtained the name and telephone number of the Commission's Deputy Chief Counsel, Earl Dryer, who deals with

veterans' preference questions. Petitioner, however, never telephoned or wrote Dryer.

65. When petitioner did not receive any documents from Day, petitioner did not write or call her or anyone else at the Commission to see if there was a problem or to ask for the documents again. Petitioner's initial letter to the Commission on September 20, 1980 when petitioner was concerned about veterans' preference, indicates petitioner knew to write the Commission to obtain information.

66. Not only did petitioner not pursue discovering the status of the December 1981 Trainee position that went to Kennedy, petitioner never pursued further employment with the Commonwealth (except this July 1985 lawsuit). Since December 1983 and February 1984, respectively, petitioner has not taken new examinations to be placed on the Commission's

certification lists for the positions of Workmen's Compensation Referee and Appeals Referee Trainee.

67. The Department of Labor and Industry employed William J. Kennedy as an Appeals Referee Trainee in Dauphin County as of February 11, 1982; since that date, Kennedy has been paid an annual salary and has received other benefits including health and medical benefits, life insurance coverage, vision and dental benefits, and retirement benefits.

68. In addition to replacing Kennedy as a Commonwealth employee, petitioner seeks past wages and benefits retroactive to February 11, 1982, when Kennedy began his employment as a Trainee.

69. As the parties stipulated, if petitioner prevails in his claim, the potential damage award could be substantial.

70. Petitioner maintains that L&I "concealed" Kennedy's selection following

the December 1981 interview by failing to inform him of that selection. Due to petitioner's delay in filing this action, however, L&I was unable to produce any documents to refute petitioner's claim of non-notification because L&I purges its personnel action records after three years.

71. In attempting to locate information for discovery or to prepare the Commonwealth's case, L&I had problems locating information due to documents having been purged, making information basically unavailable.

72. Petitioner also argues that L&I concealed information due to Cole's failure to respond to petitioner's late 1983 and early 1984 letters. The Commonwealth is unable to respond, however, because Cole cannot recall one way or another about the events concerning petitioner.

73. Had petitioner pursued the question of

veterans' preference with the Commission following either the December 7, 1981 Availability Notice, which reflected the loss of veterans' preference due to a 10 point lower score, or the January 22, 1983 conversation with Devine, when she informed him that he did not have veterans' preference, then petitioner could have taken an appeal before the Commission to determine the issue of veterans' preference rather than waiting until years later to claim he was entitled to employment and back wages.

74. Further, prejudice exists in that at the time L&I selected Kennedy to fill the Dauphin county Trainee position for which petitioner interviewed in December 1981, L&I had no reason to know or believe that petitioner might be entitled to veterans' preference, and, thus, preference in employment. L&I, believing all interviewed candidates to be without veterans' preference, selected the individual it

thought could best perform the job of Trainee.

DISCUSSION

Mandamus, of course, is an extraordinary writ that lies to compel the performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a want of any other adequate remedy. Casino v. Board of Commissioners of Armstrong County, 79 Pa. Commonwealth Ct. 242, 468 A.2d 1201 (1983). One who sues in mandamus must demonstrate an immediate and complete legal right to the demanded action.
Id.

Mandamus will be refused where the plaintiff fails to exhaust his administrative remedies. Canonsburg

General Hospital v. Department of Health, 492 Pa. 68, 422 A.2d 141 (1980). "The agency . . . should be permitted to develop the factual background upon which decisions should be based. Like the trial court, the agency should be given the first chance to exercise discretion and apply its expertness." B. Schwartz, Administrative Law, 172 (1976). A mandamus action will be dismissed where the plaintiff fails to pursue administrative remedies that had been available earlier. Delaware Valley Convalescent Center, Inc. v. Beal, 488 Pa. 292, 412 A.2d 514 (1980).[1]

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[1] In Beal a nursing home facility filed a petition for review in this court challenging a reimbursement schedule established by the Department of Public Welfare. This Court dismissed the petition. Our Supreme Court affirmed, holding that the failure to pursue a regulatory provision giving the facility 30 days after notice of the schedule to request a departmental hearing precluded judicial review.

Here, it is undisputed that the Commission grants or denies veterans' preference status to civil service applicants and then advises L&I of its decisions. As stated in the findings of fact, petitioner knew by January 1983, and should have known by December 1981, that his veterans' preference had been revoked by the Commission. Yet petitioner took no steps, administratively or otherwise, to have the Commission review its determinations until July 1985, when he initiated this suit. Even if we accept petitioner's assertion that he did not learn of the Commission's action until January 1984, he did not take any steps to address that action until July 1985. Petitioner never sought administrative review of the denial of veterans' preference as provided by statute. See Section 203 (3) of the Civil Service Act,

Act of August 5, 1941, P.L. 752, as amended, 71 P.S. 741.203 (3).[2] Accordingly, since petitioner failed to exhaust his administrative remedies he is precluded from instituting an action in mandamus, and the instant petition for review must be dismissed.

It is also noted that 42 Pa. C.S. 5522 (b) (1) provides that an action against any officer of a government unit for anything done in the execution of his office must be commenced within six months. This Court has held that this six-month statute of limitations applies to mandamus actions. Fleming v. Rockwell, 93 Pa. Commonwealth Ct. 91, 500 A.2d 517 (1985). Petitioner admits that he became aware of the Commission's revocation of the veterans' preference on January 17, 1984, although the record shows that he

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[2]Under Commission regulations, petitioner had 20 days after notice of the challenged personnel action to request a hearing. 4 Pa. Code 105.12.

learned of it much earlier. Yet he failed to take any action until July 11, 1985, well after the six-month limitations period expired. Petitioner's lack of diligence in seeking redress also appears to provide the Commission and L&I with a laches defense to the instant action. Laches is a complete defense to an action in mandamus. Class of 200 Administrative Faculty Members v. Scranton, 502 Pa. 275, 466 A.2d 103 (1983).

CONCLUSION OF LAW

Petitioner is not entitled to the extraordinary remedy of mandamus because he failed to exhaust his administrative remedy of seeking review by the Commission of its earlier decision to revoke his veterans' preference.

s/ Paul S.Lehman
Paul S. Lehman, Senior Judge

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 63 T.D. 1985

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
and THE COMMONWEALTH OF
PENNSYLVANIA, STATE CIVIL
SERVICE COMMISSION,
Respondents

DECREE NISI

NOW, December 15, 1988, after trial and consideration of this matter, it is Ordered:

1. That the "new matter" section of petitioner William Saul's "amended reply to new matter and new matter" and all corresponding attachments are stricken as being an improper pleading not in conformity with the Rules of Civil Procedure.

2. That petitioner William Saul's

(December 15, 1988 Decree Nisi Continued)

complaint and amended complaint are dismissed.

3. Each party shall bear its own costs.

The Prothonotary is directed to enter this decree nisi and to give notice thereof to the parties or their counsel of record. If no exceptions are filed within 20 days, this decree nisi shall be entered by the Prothonotary as the final decree, as of course.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

DEC 15, 1988
C. R. Hostutler
Deputy Prothonotary - Chief Clerk

s/ Paul S. Lehman
PAUL S. LEHMAN, SENIOR JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 63 T.D. 1985

WILLIAM R. SAUL,	:
Petitioner	:
	:
v.	:
	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and THE COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION,	:
Respondents	:

BEFORE:

HONORABLE FRANCIS A. BARRY, Judge
HONORABLE MADALINE PALLADINO, Judge (P.)
HONORABLE ALEXANDER F. BARBIERI, Senior Judge

ARGUED: April 7, 1989

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BARRY FILED:August 23, 1989

On July 25, 1988 Senior Judge Lehman of this Court held a hearing on William R. Saul's petition for reveiw in the nature of a complaint in mandamus. Following the entry of a decree nisi dismissing his complaint Saul filed exceptions which are now before us.

Saul's complaint sought the reinstatement of his veterans' preference status by the State Civil Service Commission (Commission) and appointment to a position as a workmen's compensation referee or appeals referee trainee by the Department of Labor and Industry (Department) together with back pay and benefits. The facts of the case are set forth in detail in Judge Lehman's opinion filed on December 15, 1988.

Saul served as a cadet at the United States Air Force Academy from June of 1969

until November of 1969. Based upon this experience Saul was granted veterans' preference status for purposes of consideration for civil service positions in the Commonwealth. In 1980 and 1981 Saul sat for the civil service examinations for the positions of workmen's compensation referee and appeals referee trainee. His final earned ratings (FERs) reflected the addition of ten points for his veterans' preference status.

On August 28, 1981 the Commission determined that Saul had erroneously been granted veterans' preference status. It concluded that Saul's service as a cadet amounted to active duty for training which did not qualify him for that status pursuant to Chapter 71 of the Military Code. 51 Pa.C.S. sections 7101-7109. Concurrent with the removal of Saul's veterans' preference status ten points were removed from his FERs.

The hearing judge found that Saul knew or should have known of the removal of his veterans' preference status during or before December of 1981. The first action taken by Saul following the removal was to file a complaint in mandamus in the Court of Common Pleas of Dauphin County on July 11, 1985. That complaint was subsequently transferred to this Court.

The hearing judge's decision was based inter alia on the conclusion that this Court does not have jurisdiction over this matter inasmuch as Saul has failed to exhaust his administrative remedies. We agree.

Saul's remedy when his veterans' preference was removed was to challenge the action before the State Civil Service Commission. An order of the Commission would then be appealable as of right to this Court. See Herskovitz v. State Civil Service Commission, 111 Pa. Commonwealth Ct. 427, 534 A.2d 160 (1987). Saul did

not pursue his administrative remedies. His failure to do so prevents this Court from exercising jurisdiction over his mandamus action. Canonsburg General Hospital v. Department of Health, 492 Pa. 68, 422 A.2d 141 (1980).

In Canonsburg our Supreme Court stated, "Well-settled case law of this Court precludes a party challenging administrative decision making from obtaining judicial review, by mandamus or otherwise, without first exhausting administrative remedies." Id. at 73, 422 A.2d at 144. The remedy which was available to the petitioners in Herskovitz is available to Saul in these proceedings. In Herskovitz three attorneys were denied veterans' preference status which denial resulted in their nonselection to the positions of administrative law judges with the Pennsylvania Public Utility Commission. The Commission held a hearing, made findings of fact and conclusions of

law and issued a final order which was appealed to this Court.

Since an administrative remedy was available to Saul which he did not pursue we agree with the hearing judge that this court is without jurisdiction to entertain his complaint.

Having determined that the complaint in this action should properly be dismissed we need not address Saul's other assignments of error.

s/Francis A. Barry
FRANCIS A. BARRY, Judge

Appendix D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No 63 T.D. 1985

WILLIAM R. SAUL, Petitioner	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and The COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION, Respondents	:

ORDER

NOW, August 23, 1989, the exceptions to this Court's decree nisi at No. 63 T.D. 1985 dated December 15, 1988 are hereby denied and the same is confirmed and is ordered to be entered by the Prothonotary as a final decree.'

s/Francis A. Barry
FRANCIS A. BARRY, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
AUG 23, 1989

s/C.R. Hostutler
Deputy Prothonotary-Chief Clerk

Appendix E

Supreme Court of Pennsylvania
Middle District

Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol
Building
P.O. Box 624
Harrisburg, PA
17108
(717)787-6181

March 14, 1990

William R. Saul, Esq.
101 Sauls Drive
Greensburg, PA 15601

Re: William R. Saul, Aplt. v. Commonwealth of Pennsylvania, Dept. of Labor & Industry, et al.
No. 47 M.D. Appeal Docket 1989

Dear Mr. Saul:

This is to advise that the following order has been entered on the Jurisdictional Statement filed for the above-captioned matter:

"March 9, 1990
Petition Denied
Per Curiam"

Very truly yours,

s/Mildred E. Williamson
Deputy Prothonotary

MEW/spb
xc: Hon. Francis A. Barry
Kate L. Mershimer, Esq.
Chief Clerk - Commonwealth Court
(No. 63 T.D. 1985)

Appendix F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 63 T.D. 1985

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and THE COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION,
Respondents

O R D E R

NOW, May 19, 1988, upon consideration of the parties' joint application for trial on limited issues, it is hereby Ordered that said motion is granted. Trial shall be commenced in the above - captioned action only on the factual issues as to liability on Count II ("Kennedy") and the Commonwealth's defense of laches. Trial is hereby fixed for July 25, 1988, at 10:00 a.m., in Courtroom Number One, South Office Building, Harrisburg, Pennsylvania.

s/Paul S. Lehman
PAUL S. LEHMAN, SENIOR JUDGE
CERTIFIED FORM THE RECORD and order exit
May 19, 1988 C.R. Hostutler
Deputy Prothonotary - Chief Clerk

Appendix G

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 63 T.D. 1985

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR AND INDUSTRY
and THE COMMONWEALTH OF
PENNSYLVANIA, STATE CIVIL
SERVICE COMMISSION,
Respondents

O R D E R

NOW, February 1, 1989, upon consideration of respondents' application to strike petitioner's supplemental proposed findings of fact and supplemental conclusions of law, and petitioner's response thereto, it appearing that the Court has previously made findings of fact and conclusions of law in this matter, and that petitioner has filed exceptions to the Court's findings, conclusions and

(February 1, 1989 Order Continued)

decree nisi, said application is granted and the supplemental proposed findings of fact and conclusions of law are stricken from the record.

s/ Paul S. Lehman
PAUL S. LEHMAN, SENIOR JUDGE

CERTIFIED FROM THE RECORD
and order exit

Feb. 1, 1989

C.R. Hostutler
Deputy Prothonotary - Chief Clerk

Appendix H

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 63 T.D. 1985

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR AND INDUSTRY
and THE COMMONWEALTH OF
PENNSYLVANIA, STATE CIVIL
SERVICE COMMISSION,
Respondents

O R D E R

NOW, February 16, 1989, upon consideration of petitioner's request for reconsideration of the December 15, 1988 decree nisi, as well as petitioner's supplemental findings of fact, and respondents' answers thereto, said request for reconsideration and supplemental findings of fact are hereby stricken as not being in conformity with the Pennsylvania Rules of Civil Procedure.

s/ Paul S. Lehman
PAUL S. LEHMAN, SENIOR JUDGE
CERTIFIED FROM THE RECORD
and order exit
Feb. 16, 1989
C. R. Hostutler
Deputy Prothonotary - Chief Clerk

Appendix I

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 63 T.D. 1985

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and THE COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION,
Respondents

BEFORE: HONORABLE JACOB KALISH,
Senior Judge

HEARD: July 23, 1987

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KALISH
FILED: July 23,1987

Petitioner, William R. Saul, is an attorney. From June 23, 1969 until November 6, 1969, petitioner was a cadet in the United States Air Force. In 1980 and 1981, petitioner took examinations offered by the State Civil Service Commission (Commission) for the positions of workmen's compensation referee and appeals referee trainee. As of December 22, 1980, petitioner had a final earned rating score of 104.79 on the Commission's employment list for the workmen's compensation referee position. That score reflected ten points for veteran's preference. As of February 26, 1981, petitioner's final earned rating score was 103.35 on the Commission's list for the appeals referee trainee position. That score also reflected ten points for veteran's preference. On August 28, 1981,

the Comission removed petitioner's veteran's preference status.

On May 3, 1981, petitioner interviewed with the Department of Labor and Industry for a workmen's compensation referee position, and on December 14, 1981 and January 22, 1983, petitioner interviewed for an appeals trainee position. He was not hired for either position. Petitioner's eligibility on the Commission's employment list for a workmen's compensation referee position expired at the end of December, 1983, and his eligibility for a appeals referee trainee position expired at the end of February, 1984. He has not taken new examinations to be placed on the Commission's employment list.

Petitioner alleges that he discovered on January 17, 1984 that the Commission had removed his veteran's preference status.

This is a mandamus action filed by petitioner seeking to compel the Department of Labor and Industry to employ him as a workmen's compenstation referee or as an appeals referee trainee.

The Commission and the Department of Labor and Industry (respondents) filed a motion for summary judgement which is what is now before the court, alleging that petitioner's action is barred by the six-month statute of limitations found in section 5522(b) (1) of the Judicial Code, 42 Pa. C.S. section 5522(b) (1), or in the alternative is barred by laches. We deny the motion.

Section 5522(b) (1) of the Judicial Code, 42 PA. C.S. section 5522(b) (1), provides:

> (b) Commencement of action required. --The following actions and proceedings must be commenced within six months:

> (1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

Petitioner contends essentially that he did not learn of the removal of his veteran's preference status until January 17, 1984, and that the respondents, by their conduct, concealed this crucial information by not informing him, so that they are estopped form raising laches as a defense.

Respondents contend that an examination of the record shows that petitioner was aware of the denial of veteran's preference long before the running of the statute; that they did not engage in any concealment; and that to permit an estoppel at this time, or deny their claim of laches would work to their prejudice.

Our duty is to examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. Green v. Juneja, 337 Pa. Superior Ct. 460. 487 A.2d 36 (1985); Mariscotti v. Tinari, 335 Pa. Superior Ct. 599, 485 A.2d 56 (1984).

Laches and estoppel are proper defenses to an action in mandamus. Erway v. Wallace, 51 Pa. Commonwealth Ct. 561, 415 A.2d 116 (1980). The application of these equitable doctrines requires an examination of the circumstances to determine whether the requirements of laches and estoppel are met. In other words, the question is factual. Class of 200 Administrative Faculty Members v. Scanlon, 502 Pa. 275, 466 A.2d 103 (1983).

Summary judgement may be granted only if there is no issue as to any material

fact and the moving party is entitled to judgement as a matter of law. Pa. R.C.P. No. 1035.

Applying the law to the facts of this case raises a myriad of factual questions concerning the circumstances surrounding petitioner's knowledge of his rejection, the reasons therefor and his conduct, and the requisite prejudice to the petitioner necessary to invoke estoppel.

Unlike Fleming v. Rockwell, 93 Pa. Commonwealth Ct. 91, 500 A.2d 517 (1985), where the preliminary objections simply raised the legal application of the six-month statute of limitations without any questions of laches, here, the record, although somewhat vague, does raise the issue of laches and estoppel with its accompanying factual questions.

Having examined the record and having

heard legal argument, this court concludes that the motion for summary judgment should be denied.

Petitioner's motion to "permit and validate," which is in the nature of a motion to amend the pleading, should be directed to the trial judge, and this court will so order.

s/ Kalish, J.
JACOB KALISH, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 63 T.D. 1985

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR AND INDUSTRY
and THE COMMONWEALTH OF
PENNSYLVANIA, STATE CIVIL
SERVICE COMMISSION,
Respondents

O R D E R

NOW, July 23, 1987, respondent's motion for summary judgement is denied. It is further ordered that petitioner's motion to permit and validate will be decided by the trial judge.

s/Kalish J.
JACOB KALISH, Senior Judge

Appendix J

Selected Trial Testimony of Edgar L. Yost, Acting Executive Director of the State Civil Service Commission

Question by Ms. Mershimer: If someone is denied veterans preference status by the Commission, is there any practice that the Commission follows when that happens?

Answer by Edgar L. Yost: In this particular instance, since Mr. Saul had initially been granted veterans preference by mistake, by clerical error, if you will, when that mistake was corrected, notice of that correction would have been sent to Mr. Saul in the form of a revised notice of examination results, and that in this case would have indicated that his name remained on the eligible list but he was not entitled to veterans preference.

(7/25/88 Hearing Transcript page 93)

Appendix K

42 Pa.C.S.A. section 5103(a): "Transfer of erroneously filed matters (a) General rule.-If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or

magisterial district of this Commonwealth where it shall be treated as if originally filled in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal."

No. 89-1810

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION; and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY,
Respondents

BRIEF IN OPPOSITION

ERNEST D. PREATE, JR.
Attorney General

By: KATE L. MERSHIMER
Senior Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
717/783-1471

Date: June 18, 1990

QUESTIONS PRESENTED

I. Whether the due process clause requires a pre-deprivation hearing when a civil service applicant loses his veterans' preference?

II. Whether the Pennsylvania court correctly dismissed the petitioner's complaint because he had not exhausted his administrative remedies?

III. Whether, under Pennsylvania law, the petitioner is entitled to a state job?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

1. Pennsylvania, in selecting among applicants for state employment, grants a preference to veterans of the armed forces. Pa. Cons. Stat., tit. 51, §§ 7102-7104 (Purdon 1975). This case arises from petitioner's attempt to regain his "veterans' preference" and thus enhance his chances of getting a state job. He claims that the Pennsylvania Civil Service Commission wrongfully removed his veterans' preference and that, as a result, the Pennsylvania Department of Labor and Industry ["the Department"] wrongfully failed to hire him.

2. In the early 1980's, Saul took civil service examinations to obtain employment with the Commonwealth. (Pet. App. 6a, 37a.) He claimed to be a

veteran entitled to preference.[1] (Pet. App. 6a-7a.) The Civil Service Commission initially gave petitioner veterans' preference, but reconsidered and then revoked his preference in August 1981. (Pet. App. 7a, 8a, 37a.) The Commission notified the petitioner of its action (Pet. App. 8a), and he learned of it by December 1981 at the latest. (Ibid.)

Under Pennsylvania law, civil service applicants who are denied veterans' preference are entitled to a hearing before the Civil Service Commission, with an appeal as of right to the Pennsylvania Commonwealth Court

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[1]Petitioner's claim is based on the four months he spent as a cadet at the United States Air Force Academy. (Pet. App. 6a.)

and discretionary review by the Pennsylvania Supreme Court. Civil Service Act, Pa. Stat. Ann., tit. 72, §741.203(3) (Purdon Supp. 1990). Herskovitz v. State Civil Service Commission, 111 Pa. Cmwlth. Ct. 427, 534 A.2d 160 (1987). (Pet. App. 30a-31a, 38a-40a).

The petitioner, however, never sought a hearing before the Commission. (Pet. App. 30a). Rather, four years later, he filed a mandamus action in Commonwealth Court to obtain employment, back pay, and benefits. (Pet. App. 30a). At that point, his only claim was that he was entitled to veterans' preference and employment as a matter of state law. (Complaint, ¶¶14, 31; Amended Complaint).

3. Following a trial, a single judge of the Commonwealth Court dismissed the petitioner's action for failure to exhaust administrative remedies. (Pet. App. 32a-34a.) After this adverse ruling, the petitioner filed exceptions and supplemental requests for conclusions of law, which --for the first time-- alleged that the Commission's removal of veterans' preference without prior notice and a hearing violated his due process rights under the fourteenth amendment. (Petitioner's Supplemental Proposed Findings of Fact and Supplemental Conclusions of Law, p. 3.) The respondents moved to strike this supplemental document as untimely and as raising a new cause of action. (Respondents' Application To Strike, ¶¶10-13), and Commonwealth Court granted

their motion. (Pet. App. 44a-45a.) Thereafter, a panel of the Commonwealth Court denied the petitioner's exceptions to the single judge's decision, without further addressing the due process claim. (Pet. App. 41a.) The Pennsylvania Supreme Court declined to review this order. (Pet. App. 42a.)

SUMMARY OF ARGUMENT

Petitioner's argument--that the Commission violated due process by failing to give him prior notice or a pre-deprivation hearing concerning the removal of his veterans' preference status--is not properly before this Court. The court below refused to consider this claim because it had not been timely or properly raised, and the Court thus lacks jurisdiction over it. Likewise, the Court does not have jurisdiction to review the petitioner's claims of error regarding interpretations of Pennsylvania law.

ARGUMENT

The Court Lacks Jurisdiction To Hear A Federal Question Not Properly Raised Nor Addressed By The State Court.

According to the petitioner, the questions presented in this case are: (1) whether the due process clause requires that he receive notice and a hearing before the removal of veterans' preference status; (2) whether Pennsylvania law required him to exhaust his administrative remedies before seeking judicial review of the removal of his preference status; and (3) whether Pennsylvania law required a state agency to employ him. (Pet. ii-iii). None of these questions, however, is properly before the Court. The first issue was neither timely nor properly raised in the court below, nor addressed by the state court, and the latter two issues do not present federal questions.

1. In the court below, the petitioner challenged the removal of his veterans' preference relying solely on state law. (Pet. App. 15a.) (Complaint; Amended Complaint.) The lower court dismissed the petitioner's mandamus action for failure to exhaust his administrative remedies. See Canonsburg General Hospital v. Department of Health, 492 Pa. 68, 73, 422 A.2d 141, 144 (1980). (Pet. App. 28a-32a, 38a-41a.) Only at this point--for the first time--did the petitioner claim that the Commission's notice to him and the lack of a pre-deprivation hearing was a violation of the fourteenth amendment. (Petitioner's Supplemental Proposed Findings of Fact and Supplemental Conclusions of Law, p. 3.) Commonwealth Court

subsequently refused to permit this untimely attempt to raise a new cause of action and never addressed the due process claim. (Pet. App. 44a-45a.)

It is well settled that under 28 U.S.C. §1257, a federal claim must be adequately presented in the state courts for the Supreme Court to have jurisdiction. Webb v. Webb, 451 U.S. 493, 496-97 (1981). The Court will not hear federal issues raised before it for the first time when reviewing state court decisions. Id. at 498-99. In fact, if the state court does not pass upon a federal question, as is the case here, it is presumed the lower court's action was for want of proper presentation before it. Id. at 495.

Clearly, the petitioner's efforts to raise this new federal claim three and one-half years after filing suit and, more importantly, after trying

and losing his case, was untimely, improper, and correctly rejected by the state court. Contrary to the petitioner's assertion, Pa.R.Civ.P. 1019(a), which requires parties to plead their facts concisely, does not authorize parties to raise new causes of action following the dismissal of their actions. Rather, Pennsylvania law, like federal law, requires parties to timely plead new causes of action. See Jones v. Cheltenham Township, 117 Pa. Cmwlth. Ct. 440, 444-45, 543 A.2d 1258, 1260 (1988). Because petitioner's federal claim was not first passed upon by the state court, the Court may not hear it.

2. As to the remaining issues presented by the petitioner, these issues concern only interpretations of state

law. Accordingly, the Court has no jurisdiction to review the state court's decision. Webb, 451 U.S. at 494-96 & n.1.

CONCLUSION

For the foregoing reasons, the respondents ask that the writ of certiorari be denied.

Respectfully submitted,

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